

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 17, 2009

TRACY ALVIN ARMSTRONG v. STATE OF TENNESSEE

Appeal from the Circuit Court for Marshall County
No. 08CR44 Lee Russell, Judge

No. M2008-01818-CCA-R3-PC - Filed August 11, 2009

Petitioner, Tracy Alvin Armstrong, also known as “Ta,” pled guilty to two counts of selling cocaine weighing in excess of .5 gram, both Class B felonies, and one count of selling cocaine weighing less than .5 gram, a Class C felony. In exchange for the guilty plea, three charges against Petitioner were dismissed. He received a sixteen-year sentence on each Class B felony and a ten-year sentence on the Class C felony. Petitioner was sentenced as a multiple offender for an effective sentence of sixteen years. Petitioner now seeks post-conviction relief, on the alleged basis that he received ineffective assistance of counsel and that his guilty plea was involuntarily entered. Petitioner also claims that the post-conviction statute is unconstitutional and that he was sentenced in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). We determine that Petitioner has failed to show that his guilty plea was entered involuntarily or that he received ineffective assistance of counsel. Further, Petitioner raises the constitutionality of the statute for the first time on appeal, waiving the issue. Finally, *Blakely* does not apply to cases on collateral appeal. Accordingly, the judgment of the post-conviction court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Hershell D. Koger, Pulaski, Tennessee, for the appellant, Tracy Alvin Armstrong.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Mike McCowen, District Attorney General, and Weakley E. Bernard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Petitioner was indicted by the Marshall County Grand Jury in January of 2006 for two counts of delivery of more than .5 gram of cocaine and two counts of the sale of more than .5 gram of

cocaine. Petitioner was also indicted for one count of delivery of less than .5 gram of cocaine and one count of the sale of less than .5 gram of cocaine.

In June of 2007, Petitioner entered a guilty plea in exchange for an effective sentence of sixteen years. Petitioner pled guilty to two counts of the sale of more than .5 gram of cocaine, both Class B felonies, and one count of the sale of less than .5 gram of cocaine, a Class C felony. In exchange for the guilty plea, the three remaining charges were dismissed. Petitioner received a sixteen-year sentence for each Class B felony and a ten-year sentence for the Class C felony. The sentences were ordered to run concurrently, for a total effective sentence of sixteen years. As a Range II, multiple offender, Petitioner was required to serve 35% of his sentence.

At the plea submission hearing, the prosecutor summarized the facts leading up to the convictions. On two occasions, Petitioner met a confidential informant and sold him or her cocaine in excess of .5 gram. On the last occasion, Petitioner sold cocaine to a confidential informant that weighed less than .5 gram. These exchanges were all videotaped.

Subsequently, on March 28, 2008, Petitioner filed a pro se petition for post-conviction relief. Counsel was appointed to represent Petitioner, and an amended petition was filed. In the petition, Petitioner alleged that he received ineffective assistance of counsel, his guilty plea was involuntary, and that his sentence violated *Blakely v. Washington*, 542 U.S. 296 (2004).

Facts at the Post-conviction Hearing

At the post-conviction hearing, Petitioner testified that he was represented by an attorney from the Public Defender's Office. According to Petitioner, he was able to review the tapes of the undercover drug sales at least twice prior to the original trial date. He also recalled meeting with trial counsel every time he had a court appearance and at least two other times. Petitioner admitted that he discussed the terms of the plea agreement with trial counsel but that he wanted a better offer. The original plea offer specified that Petitioner would receive a twenty-five-year sentence.

Petitioner testified he was disappointed with trial counsel because the attorney did not properly investigate the proposed witnesses that Petitioner suggested. Petitioner claimed that the witnesses could have testified to his intimate relationship with the confidential informant. Petitioner admitted that he only gave the names and contact information to trial counsel the day before the trial was scheduled to begin. Petitioner thought that the testimony of these potential witnesses could get his charges reduced to casual exchange.

Petitioner informed the post-conviction court that he accepted the plea offer after the jury was empaneled because he thought it was in his best interest. Petitioner admitted that he was scared and did not think that the jury would be very sympathetic and relate to his situation. Further, Petitioner expressed concern that his prior drug charges would be revealed if he testified at trial.

Petitioner admitted that trial counsel was truthful with him throughout the process and denied that he was forced to plead guilty. Petitioner also agreed that trial counsel did not fail to do his job. Petitioner, however, did not think that trial counsel should have advised him to take the State's sixteen-year offer.

Petitioner thought that a post-conviction petition would help to lower his sentence. He explained that his sentence was not fair because the "so-called confidential informant" had a long criminal background.

Trial counsel testified that, at the time of the plea agreement, he had been licensed to practice law for approximately eight years and had worked solely in the area of criminal defense for a public defender's office since his graduation from law school. Trial counsel remembered meeting with Petitioner on several occasions. Of particular interest to trial counsel was informing Petitioner that his lengthy criminal history would be used against him if he testified at trial. Trial counsel remembered that Petitioner was most concerned about getting the best deal possible. Petitioner even asked about helping the Drug Task Force in order to reduce his jail time. Trial counsel explained that because of Petitioner's prior robbery, he would not be a good candidate for task force work. Trial counsel also expressed discontent over Petitioner's decision to contact the Drug Task Force without his knowledge. Petitioner actually signed a document admitting that he had previously obtained cocaine for other people in order to supply his own cocaine habit. Trial counsel explained that this document served to bolster the State's case against Petitioner.

Trial counsel explained that the State's case against Petitioner was strong. There was video and audio of Petitioner selling drugs to confidential informants. The video and audio were good quality, and Petitioner could clearly be identified as the perpetrator.

Trial counsel remembered that Petitioner told trial counsel approximately three days prior to trial that he would settle for a fifteen-year sentence. The State would not agree to this amount of incarceration. This is around the same time that Petitioner gave trial counsel the names of several potential witnesses. Trial counsel was unable to locate the witnesses.

Trial counsel remembered meeting with Petitioner about seven times prior to the plea hearing. On the morning of trial, after the jury was selected, Petitioner again expressed his desire to secure a plea. The State made a final plea offer, and Petitioner accepted that offer. Trial counsel went over the conditions of the plea agreement with Petitioner prior to its submission.

At the conclusion of the post-conviction hearing, the post-conviction court determined that Petitioner "knowingly, understandingly, and voluntarily pled guilty." The court felt that Petitioner "was trying to get the best deal" and was "not a novice to the criminal system," so he had some knowledge about the criminal process. The post-conviction court commented that trial counsel was "experienced and knowledgeable" as well as being "forthright and ethical." In other words, Petitioner was "lucky" to have had trial counsel representing him. The post-conviction court felt that trial counsel "represented [Petitioner] above and beyond the competency demanded of attorneys"

and, therefore, Petitioner did not receive ineffective assistance of counsel. The post-conviction court denied the petition for relief, and Petitioner filed a timely notice of appeal.

Analysis

On appeal, Petitioner contends for the first time that Tennessee Code Annotated section 40-30-110(f) is unconstitutional. Tennessee Code Annotated section 40-30-110(f) provides: “[t]he petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence. There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived.” Specifically, Petitioner argues that the standard of proof “violates US Supreme Court precedent and establishes an unconstitutional standard of proof.” He suggests that this Court apply the “reasonable probability” standard of proof on appeal. The State insists that Petitioner has waived this claim for failure to assert it on appeal.

We agree. When an issue is not addressed with the post-conviction court, it “will generally not be addressed on appeal.” *Walsh v. State*, 166 S.W.3d 641, 645-46 (Tenn. 2005) (citing *Rickman v. State*, 972 S.W.2d 687, 691 (Tenn. Crim. App. 1997)); *see also* T.C.A. § 40-30-110(f). Petitioner has waived this issue.

Post-Conviction Standard of Review

The post-conviction court’s findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court’s findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court’s conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Shields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Ineffective Assistance of Counsel

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below “the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). “Because a petitioner must

establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim.” *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997).

As noted above, this Court will afford the post-conviction court’s factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court’s findings. *See id.* at 578. However, our supreme court has “determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo” with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). As stated above, in order to successfully challenge the effectiveness of counsel, Petitioner must demonstrate that counsel’s representation fell below the range of competence demanded of attorneys in criminal cases. *See Baxter*, 523 S.W.2d at 936. Under *Strickland v. Washington*, 466 U.S. 668 (1984), the petitioner must establish: (1) deficient representation; and (2) prejudice resulting from the deficiency. 466 U.S. at 694. However, in the context of a guilty plea, to satisfy the second prong of *Strickland*, Petitioner must show that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 59; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

When analyzing a guilty plea, we look to the federal standard announced in *Boykin v. Alabama*, 395 U.S. 238 (1969), and the State standard set out in *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). In *Boykin*, the United States Supreme Court held that there must be an affirmative showing in the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. *Boykin*, 395 U.S. at 242. Similarly, our Tennessee Supreme Court in *Mackey* required an affirmative showing of a voluntary and knowing guilty plea, namely, that the defendant has been made aware of the significant consequences of such a plea. *Pettus*, 986 S.W.2d at 542.

A plea is not “voluntary” if it results from ignorance, misunderstanding, coercion, inducements, or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court

must determine if the guilty plea is “knowing” by questioning the defendant to make sure he fully understands the plea and its consequences. *Pettus*, 986 S.W.2d at 542; *Blankenship*, 858 S.W.2d at 904.

Petitioner claims on appeal that his plea was “involuntary and unintelligently entered”. However, trial counsel testified that he explained the plea agreement to Petitioner and the plea colloquy reveals that Petitioner was made aware of the consequences of pleading guilty. Further, the guilty plea colloquy demonstrates that he agreed that he understood the plea agreement and that the trial court again explained both the charges and the corresponding sentences. During the plea colloquy, Petitioner admitted that he understood his rights and the sentence he was about to receive and was ready to plead guilty. Petitioner did not present any proof other than his own testimony. No corroborative proof was presented. This issue is without merit.

Petitioner also contends that he received ineffective assistance of counsel based on trial counsel’s alleged failure to prepare for trial by locating witnesses that would have testified about Petitioner’s relationship with the confidential informant. Trial counsel testified at the post-conviction hearing that he was given the names of the potential witnesses in close proximity to trial, that he tried to find the witnesses but was unable to do so prior to trial. Petitioner failed to present these witnesses at the post-conviction hearing to place their testimony on the record, a pre-requisite to success on this issue. *See Black v. State*, 794 S.W.2d 752, 758 (Tenn. Crim. App. 1990). Further, Petitioner failed to show that had trial counsel located these witnesses he would have insisted on going to trial. Petitioner himself admitted at the post-conviction hearing that his main concern was securing the shortest sentence possible. This issue is without merit.

Constitutionality of Tennessee Code Annotated section 40-30-110(f)

On appeal, Petitioner contends for the first time that Tennessee Code Annotated section 40-30-110(f) is unconstitutional. Tennessee Code Annotated section 40-30-110(f) provides: “[t]he petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence. There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived.” Specifically, Petitioner argues that the standard of proof “violates US Supreme Court precedent and establishes an unconstitutional standard of proof.” He suggests that this Court apply the “reasonable probability” standard of proof on appeal. The State insists that Petitioner has waived this claim for failure to assert it on appeal.

We agree. When an issue is not addressed with the post-conviction court, it “will generally not be addressed on appeal.” *Walsh v. State*, 166 S.W.3d 641, 645-46 (Tenn. 2005) (citing *Rickman v. State*, 972 S.W.2d 687, 691 (Tenn. Crim. App. 1997)); *see also* T.C.A. § 40-30-110(f). Petitioner has waived this issue.

Petitioner also argues that his sentence violates *Blakely v. Washington*, 542 U.S. 296 (2004). Courts in Tennessee have held that *Blakely* does not apply retroactively to cases that are on collateral

appeal. *See Donald Branch v. State*, No. W2003-03042-CCA-R3-PC, 2004 WL 2996894, at *10 (Tenn. Crim. App., at Jackson, Dec. 21, 2004), *perm. app. denied*, (Tenn. May 23, 2005); *Carl Johnson v. State*, No. W2003-02760-CCA-R3-PC, 2005 WL 181699, at *4 (Tenn. Crim. App., at Jackson, Jan. 25, 2005), *perm. app. denied*, (Tenn. June 27, 2005). This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

JERRY L. SMITH, JUDGE